

**Rappazzo Electric Company, Inc. and International
Brotherhood of Electrical Workers, Local 166.**
Case 3-CA-17167

December 16, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

Upon a charge filed by the Union on June 17, 1992, the General Counsel of the National Labor Relations Board issued a complaint on August 5, 1992, against Rappazzo Electric Company, Inc., the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing to abide by article V (Apprenticeship and Training), and article VI (Fringe Benefits) of the collective-bargaining agreement. On October 5, 1992, the Respondent filed an answer admitting in part and denying in part the allegations of the complaint and submitting an affirmative defense.

The complaint alleges, and the Respondent admits, that the Respondent is obligated to abide by the provisions of the collective-bargaining agreement, including articles V and VI. The Respondent also admits to the allegation that since about February 1, 1992, and continuing thereafter, it has failed to abide by those provisions. The Respondent denies, however, that this conduct constitutes an unlawful refusal to bargain in good faith and asserts the following affirmative defense:

Due to financial difficulties caused by general contractors not paying for completed work Rappazzo Electric Co., Inc. has been unable to pay the benefits owed Local 166. Rappazzo Electric Co., Inc. intends to arrange a payment plan to repay benefits owed.

On October 9, 1992, the General Counsel filed a motion to transfer proceeding to the Board, to strike Respondent's affirmative defense and for summary judgment. On October 15, 1992, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

It is well established that Section 8(a)(5) and (1) of the Act prohibits an employer that is party to a collective-bargaining agreement from modifying the terms and conditions of employment established by that agreement without obtaining the consent of the union. *Nick Robilotto, Inc.*, 292 NLRB 1279 (1989), and cases cited there. The Respondent has admitted that it

unilaterally failed to abide by the terms and conditions of employment set out in articles V and VI of the agreement. Accordingly, the Respondent has admitted all the facts material to a resolution of the unfair labor practice issues raised by the complaint.

Neither the Respondent's claim that it is financially unable to make the required payments nor its statement of intent to arrange a payment plan to repay benefits owed constitutes an adequate defense to the allegation that it has violated Section 8(a)(5) and (1) of the Act.¹ *Nick Robilotto, Inc.*, supra. Because we find the Respondent's affirmative defense to be inadequate, and because there are no material facts in dispute, we grant the Motion for Summary Judgment.²

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Rappazzo Electric Company, Inc., a New York corporation, is engaged in the electrical contracting business at its facility in Albany, New York. During the 12 months preceding issuance of the complaint, the Respondent derived gross revenues in excess of \$1 million, of which an amount in excess of \$50,000 was derived from providing services to other enterprises, including New York Telephone Co., which are directly engaged in interstate commerce. Further, the Respondent is a member of the Albany Electrical Contractors Association, the employer-members of which have delegated to the Association the authority to represent them for purposes of collective bargaining and have collectively purchased and received goods and materials valued in excess of \$50,000 during the 12 months preceding the issuance of the complaint.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and

¹ In Member Oviatt's view, there are limited circumstances, not present here, in which an employer's financial inability to pay constitutes a defense to an allegation that it unilaterally and unlawfully ceased contractually required payments to union benefit funds. To make this defense successfully, an employer must establish that it continued to recognize—and did not repudiate—its contractual obligations. To satisfy this requirement, an employer must prove that its nonpayment was followed by its request to meet with the union to discuss and resolve the nonpayment problem. In so doing, an employer demonstrates its adherence to the contract and the bargaining process. In such circumstances, Member Oviatt would find that an employer's nonpayment of contractually required benefit fund payments would not violate Sec. 8(a)(5) of the Act. See *Zimmerman Painting & Decorating*, 302 NLRB 856 (1991); *Tammy Sportswear Corp.*, 302 NLRB 860 (1991). In this case, however, the Respondent does not even allege in its answer that it requested to meet with the Union to work out its nonpayment problems. Accordingly, Member Oviatt agrees that the Respondent's affirmative defense is inadequate.

² Having granted this Motion for Summary Judgment, we need not, and do not, pass on the General Counsel's motion to strike the Respondent's affirmative defense.

(7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

On April 19, 1985, the Respondent, an employer engaged in the construction industry, granted recognition to the Union as the exclusive collective-bargaining representative of the unit³ without regard to whether the majority status of the Union was established under Section 9 of the Act, and since then has entered into successive collective-bargaining agreements with the Union, the current term of which is for the period May 1, 1991, until April 30, 1993.

Since about February 1, 1992, and continuing thereafter, the Respondent has failed to continue in full force and effect all the terms and conditions of the current collective-bargaining agreement by failing to abide by the following provisions:

Article V, Apprenticeship and Training
Article VI, Fringe Benefits

The terms and conditions of employment set by these contract provisions are mandatory subjects for the purposes of collective bargaining. The Respondent has engaged in the conduct described above without the Union's consent.

We find that by the conduct described above, the Respondent has failed and refused to bargain collectively and in good faith with the representative of its employees and is thereby engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing on about February 1, 1992, and thereafter to continue in full force and effect all the terms and conditions of the current collective-bargaining agreement, including articles V and VI, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We shall order that the Respondent abide by the terms of articles V and VI of the collective-bargaining agreement, make the contractually required benefit payments owed to the Union in accordance with the Board's decision in *Merryweather Optical Co.*, 240 NLRB 1213, 1216

³Par. VI of the complaint describes the unit as "All journeymen, foremen and apprentices."

(1979), and reimburse its unit employees for any expenses ensuing from its unlawful failure to make the required benefit payments, as provided in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. mem. 661 F.2d 940 (9th Cir. 1981). Interest on amounts owing to employees shall be paid as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Rappazzo Electric Company, Inc., Albany, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to abide by articles V and VI of the collective-bargaining agreement with the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Abide by articles V and VI of the collective-bargaining agreement by paying the benefit amounts which are due and owing, and make employees whole for any expenses ensuing from its unlawful failure to make these payments, with interest, as provided in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facility in Albany, New York, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁴If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to continue in full force and effect all the terms and conditions of the current collective-bargaining agreement with the International

Brotherhood of Electrical Workers, Local 166, by failing to abide by the provisions of article V (Apprenticeship and Training) and article VI (Fringe Benefits).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL abide by the provisions of articles V and VI of the collective-bargaining agreement by paying the benefit amounts that are due and owing and reimbursing unit employees for any expenses ensuing from our unlawful failure to make the benefit payments.

RAPPAZZO ELECTRIC COMPANY, INC.